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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-932

LARRY L. WARINNER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-1327

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Larry L. Warinner, by his attorney, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth (8th) Circuit entered October 11, 1979, petition for rehearing denied November 14, 1979. The issuance of mandate has been deferred until December 14, 1979, pending the filing and disposition of this Petition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which is attached hereto as Appendix A, was filed October 11, 1979, petition for rehearing denied November 14, 1979, with mandate stayed until December 14, 1979, pending filing and final disposition of this Petition.

JURISDICTION

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED AND REASONS WRIT SHOULD BE GRANTED

1. Was Defendant Warinner's W-4E --- the filing of which provided the basis for his indictment --- obtained in violation of his Fourth, Fifth and Sixth Amendment rights?

2. Was it error to deny Defendant an evidentiary hearing to determine whether his prosecution was the product of unconstitutional discrimination, where documentary

evidence and testimony established a prima facie case that he was charged because of his exercise of First Amendment freedoms?

3. Where all but registered voters are excluded from jury service was the Defendant deprived of a jury selected from a fair cross section of the community?

I

After Defendant Warinner had become the focus of a criminal investigation, one of his employer's payroll clerks named Kitty Essman instructed him by letter that: (1) "due to a letter received from the Internal Revenue Service ... please forward the completed new forms W-4E or the W-4 form without any alteration or remarks (emphasis in original) as soon as possible"; and (2) "failure to submit the new form will result in Federal tax deduction based on [a] single [person] with no exemption starting September 21, 1976". As instructed by the letter from Essman, Defendant Warinner submitted to his employer a form W-4E "without any alteration or remarks" on

September 15, 1976. This act constitutes the gravamen of the indictment. Submission of a W-4 or W-4E to his employer by Warinner "without any alteration or remarks was required by that portion of IRS regulation §31.3402(f)(2)-1(e) which provides that "Any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid"; but §31.3402(f)(2)-1(e) also provides the following:

"Any witholding exemption certificate which the employee clearly indicates to be false by an oral statement or by a written statement made by him to the employer on or before the date on which the employee furnished such certificate is also invalid. If an employer receives an invalid withholding exemption certificate, he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer shall withhold from the employee as from a single person claiming no exemptions."

In this case the Defendant complied with the employer's request; notwithstanding his compliance, the employer thereafter withheld federal income taxes from Warinner's paycheck on the basis of a single person with no exemptions, despite the employer's knowledge that Warinner supports his wife and their two minor children. Simply stated: the IRS ordered Warinner's employer to ignore requests that no federal income tax be withheld from Warinner's wages and went so far as to withhold more than was proper - the maximum amounts, i.e. based on a single person with no exemptions, were, and still are, withheld from his paychecks. But just to teach Warinner a lesson, the IRS has added insult to injury by a criminal prosecution of a taxpayer who has been and continues to be penalized for each and every paycheck. The penalties are imposed because Warinner refuses to accede to the IRS demand that he fill out a W-4 form on which he acknowledges his liability for federal income tax. In

this the IRS goes too far.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 87 L.Ed. 1628, 63 S.Ct. 1178; Abood v. Detroit Board of Education, 431 U.S. 209, 52 L.Ed. 2d 261, 284, 97 S.Ct. 1782.

Furthermore, the opinion of the Court of Appeals misapprehends the holding of the United States Supreme Court in Boyd v. United States, 116 U.S. 616 (1886); at page 6 of its opinion the Court of Appeals held:

> "In Boyd the Supreme Court declared unconstitutional a subpoena of an invoice which showed that importers were fraudulently claiming excess duty exemptions. Boyd, however, involved compulsory production of evidence under a subpoena. Here, Warinner's filing of the form W-4E was not compulsory, but rather entirely voluntary. Appellant was not obliged to file a form W-4E to carry out his tax protest. He could have filed a form W-4 and paid his income tax and then filed for a refund at the end of the year. True,

> he would have been denied the use of his money for a time; but that economic compulsion does not change the essentially voluntary nature of his act. Warinner's voluntary filing simply is not entitled to fourth amendment protection." [emphasis added]

The portion excerpted establishes an erroneous reading of Boyd precisely because there was no "'compulsory production' of evidence under a subpoena" in Boyd; but the Boyd Court found "economic compulsion" that offended the Fourth and Fifth Amendments because if the parties served with the subpoena refused to produce the invoice, their property - in this case plate glass - was forfeited. There was no other "compulsion" attached to the subpoena, i.e. the sole consequence of disobedience of the subpoena was forfeiture of the property. Warinner's position was functionally identical, i.e. failure to file his W-4E would result in forfeiture of his property because withholding from his paycheck would otherwise have been based on a

single person with no exemptions; in fact, there was nothing voluntary about Warinner's filing, since 26 U.S.C. §7205, under which he was convicted provides in pertinent part "Any individual required to supply information to his employer ... who willfully supplies false or fraudulent information thereunder which would require an increase in the tax to be withheld...shall... be fined not more than $500., or imprisoned not more than one year, or both." The "nullity" filed by Warinner actually produced the maximum tax to be withheld. The W-4E for which he was convicted was a nullity because of the documents he had furnished with previously filed W-4E's and statements he had made to his employer in connection therewith. These documents and statements indicated that the W-4E was "false" for purposes of computing withholding pursuant to IRS regulations and, accordingly, nullified any subsequent W-4E filed by Warinner based on the position he espoused orally and in those documents

submitted to his employer. 31.3402(f)(2)-1(e). Proof of the "null" value of all the W-4E's submitted subsequent to the W-4E filed with attached protest material is conclusively established by the IRS, which ordered North Central Airlines to disregard Warinner's W-4E's and withhold from his wages as if he were single with no exemptions.

In order to reach its results the Court of Appeals misstates undisputed facts adduced at trial regarding the relationship between the IRS and Ms. Essman. At page 5 of its opinion the Court of Appeals incorrectly asserts that "Kitty Essman's dealings with Warinner were also conducted without direct instigation by or participation of government agents. Although the IRS informed Ms. Essman of the potential invalidity of Larry Warinner's tax withholding form, the IRS did not ask her to request that Warinner file a new form W-4E." These statements stand in diametric opposition to undisputed facts elicited at trial and the clear

command of §31.3402(f)(2)-1(e), but they provide the factual foundation for the holding of the Court of Appeals:

> "Appellant's position, however, is untenable. In United States v. Echols, 477 F.2d 37 (CA 8, 1973), this court recognized the general rule that a search will be considered invulnerable to fourth amendment attack so long as the search is conducted for private purposes and without instigation or participation of government agents."

The Essman letter to Warinner that produced the "crime" here at issue, i.e. the filing of a W-4E which was and is a nullity, was sent solely because the IRS instructed her employer to disregard Warinner's previously filed W-4E and the regulations compelled the employer to notify Warinner that his W-4E was disregarded. The criminal investigation had concededly focussed on Warinner during April of 1976, and the Essman letter was sent in August - after the IRS had 1) instructed the employer to disregard Warinner's W-4E filed in April and 2) referred

the employer to §31.3402(f)(2)-1(e), which required the Essman letter. That being the case, can it be seriously contended that this was done "for private purposes and without instigation or participation of government agents"?

II

The Court of Appeals' determination at pages 8 and 9 of its opinion "that appellant did not establish a prima facie case of selective prosecution sufficient to warrant an evidentiary hearing" is incorrect because, although appellant "failed to demonstrate conclusively that his election was based impermissibly on exercise of his first amendment rights", that failure was caused by the refusal of the magistrate to permit Defendant's counsel to question the IRS witnesses with knowledge of how Warinner came to the attention of the IRS. Warinner could have established that "his selection was based impermissibly on exercise of his firth amend-

ment rights" if he had been permitted to inquire into the source which engendered the investigation conducted at North Central Airlines which yielded Warinner's W-4E. The testimony of the agents at the hearing held February 19, 1979, before Magistrate J. Earl Cudd indicated that undercover informants had been used to identify "tax protestors" by infiltrating meetings of "tax protest" groups. The undersigned believes that this undercover activity led to the North Central Airlines investigation, the cause of which was never explained, and Warinner's First Amendment rights have been violated because of the penalty imposed upon him for criticizing government policies. See pp. 73-98 of the Transcript of proceedings held February 19, 1979, which consists of disingenuous testimony of two IRS Intelligence agents to the effect that Warinner's April, 1976, W-4E was discovered during a "routine check". Defendant's counsel was not permitted to question the agent who

conducted the "routine check" to see how or why it had been undertaken.

III

This Court should reconsider the Court of Appeals holding that exclusion of all but registered voters did not violate Warinner's right to a jury comprised of a fair cross-section of the community, particularly in the aftermath of the recent decision of the Court in Duren v. Missouri, 99 S.Ct. 1623, 58 L.Ed.2d 317 (1979), which reiterated the three-part test set forth in Taylor v. Louisiana, 419 U.S. 522 (1975), under which a defendant must show the following to establish a prima facie case of violation of the fair cross-section requirement: 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the

community; and 3) that this underrepresentation results from systematic exclusion of the group in the jury selection process.

Those citizens in our society who do not register to vote, among whom are the appellant and virtually everyone sympathetic to his protest, are: 1) "distinctive" because of their enormous numbers and their disaffection with the present political process, 2) not represented on any juries in the District of Minnesota, which cannot be fair and reasonable, and 3) systematically excluded by the jury selection process, i.e. none but registered voters are eligible.

No showing of "invidious discrimination" in voter registration is required as is conclusively established by Taylor, supra, and Duren, supra.

For all of the foregoing reasons and especially because the opinion of the Court of Appeals is replete with misstatements of the record and erroneous interpretations of the

decisions of this Court, which will cause confusion and injustice in great measure, the Petitioner prays that this Court grant a Writ of Certiorari to review and rectify the decision of the Eighth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 31.3402(f)(2)-1(e)
2. 4th Amendment
3. 5th Amendment
4. 6th Amendment
5. 26 U.S.C. §7205
6. 18 U.S.C. §1001

§31.3402(f)(2)-1(e).
"(e) Invalid withholding exemption certificates. Any alteration of or unauthorized addition to a withholding exemption certificate shall cause such certificate to be invalid; see paragraph (b) of §31.3402(f)(5)-1 for the definitions of alteration and unauthorized addition. Any withholding exemption certificate which the employee clearly indicates to be false by an oral

statement or by a written statement (other than one made on the withholding exemption certificate itself) made by him to the employer on or before the date on which the employee furnishes such certificate is also invalid. For purposes of the preceding sentence, the term 'employer' includes any individual authorized by the employer either to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions. If an employer receives an invalid withholding exemption certificate he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and he shall request another withholding exemption certificate from the employee. If the employee who submitted the invalid certificate fails to comply with the employer's request, the employer shall withhold from the employee as from a single person claiming no exemptions (see §31.3402(f)(2)-1(a); if, however, a prior certificate is in effect with respect to the employee, the employer shall continue to withhold in accordance with the prior certificate. For instructions to employers who receive valid withholding exemption certificates which they have reason to believe may be incorrect, see §31.3401(e)-1(b) and §31.3402(n)-1. This paragraph applies only with respect to withholding exemption certifi-

cates received by an employer after July 26, 1976.

. . .

§31.3402(f)(5)-1. Form and contents of withholding exemption certificate. -(a) Forms W-4 and W-4E are the forms prescribed for the withholding exemption certificate required to be filed under section 3402(f)(2). Form W-4 is the form to be used unless the employee desires, in accordance with the provisions of §31.3402(f)(2)-1, to use a withholding exemption certificate which contains statements described in §31.3402(n)-1, in which case Form W-4E is the form to be used. A withholding exemption certificate shall be prepared in accordance with the instructions and regulations applicable thereto, and shall set forth fully and clearly the data therein called for. Blank copies of Forms W-4 and W-4E will be supplied employers upon request to the district director. In lieu of the prescribed form, employers may prepare and use a form the provisions of which are identical with those of the prescribed form.

(b) A Form W-4 or W-4E does not meet the requirements of section 3402(f)(5) or this section and is invalid if it contains an alteration or unauthorized addition. For purposes of §31.3402(f)(2)-1(e) and this paragraph ---

(1) An alteration of a withholding exemption certificate is any deletion of the language of the jurat or other similar provision of such certificate by which the employee certifies or affirms the correctness of the completed certificate, or any material defacing of such certificate;

(2) An unauthorized addition to a withholding exemption certificate is any writing on such certificate other than the entries requested (e.g. name, address, and number of exemptions claimed)."

Amendment 4, United States Constitution: "Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 5, United States Constitution: "Criminal actions--Provisions concerning--Due process of law and just compensation clauses. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 6, United States Constitution: "Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

26 U.S.C. §7205. "Fraudulent Withholding Exemption Certificate or Failure to Supply Information. Any individual required to supply information to his employer under section 3402(f) who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be

withheld under section 3402, shall, in lieu of any penalty otherwise provided, upon conviction thereof, be fined not more than $500, or imprisoned not more than 1 year, or both."

18 U.S.C. §1001. "Statements or entries generally. Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

By Indictment filed February 10, 1978, Larry L. Warinner was charged with one count of willfully supplying false and fraudulent federal withholding tax information in violation of 26 U.S.C. §7205.

Defendant had provided his employer with a W-4E certificate on April 1,1976, on which he inscribed "Exhibits I through IV and 'A'

through 'C' which is (sic) attached hereto is made a part hereof." Attached to that W-4E were voluminous documents explicating Defendant's political, philosophical, religious, and legal bases for filing the W-4E. During the latter part of August or early September, 1976, the Defendant received a note from his employer's payroll manager, Ms. Kitty Essman, which stated that the W-4E on file was invalid according to a letter from the IRS and that, unless the Defendant forwarded a completed new form W-4 or W-4E form "without any alteration or remarks" (emphasis in original), withholding on the basis of a single person with no exemptions would commence September 21, 1976. Accordingly, on September 15, 1976, the Defendant submitted a W-4E to his employer without any alteration or remarks. This act constitutes the basis for the one count indictment in this case.

During April, 1976, Special Agent William Tschida of the IRS had begun investigating Warinner and notified Warinner that the W-4E was not the proper document for him to file. Although advised by Warinner of the latter's refusal to be interviewed, Tschida went to Warinner's place of employment and demanded to speak to him. Warinner politely declined. Other IRS agents instructed Warinner's employer, North Central Airlines, to disregard any W-4E's filed by Warinner and referred North Central to §31.3402 (f)(2)-1(e) of the IRS regulations which provides for notice to the employee of the type encompassed in the letter from Ms. Essman.

Mr. Warinner's defense was that he believed himself to be exempt from withholding for all the reasons set forth in the documents attached to the W-4E submitted in April of 1976. The Government prosecuted on the theory that the grounds were a subterfuge to illegally avoid taxes.

A jury trial was held in the United States District Court for the District of Minnesota, Fourth Division, before the Honorable Harry H. MacLaughlin. Judgment of conviction was entered on the verdict of guilty on April 18, 1979. Defendant was sentenced to one year of imprisonment.

In affirming the District Court's denial of Defendant's motion to suppress the W-4E at issue on the basis that it was 1) elicited by the Government's use of a third party, 2) after Defendant was the focus of a criminal investigation, 3) under the threat of confiscating Warinner's wages, and 4) with no Miranda-type warning (in violation of the Privacy Act), the Eighth Circuit held:

> "Appellant's position, however, is untenable. In United States v. Echols, 477 F.2d 37 (CA 8, 1973), this court recognized the general rule that a search will be considered invulnerable to fourth amendment attack so long as the search is conducted for private purposes and without instigation

> or participation of government agents."

In so doing the Eighth Circuit disregarded, without discussion, its own holding in United States v. Haes, 551 F.2d 767, 770 (CA 8, 1977):

> "...where a search is physically conducted by a private individual but only at the government's initiation and under their guidance it is not a private search."

The Eighth Circuit affirmed the District Court's denial of Defendant's motion to dismiss based on impermissibly discriminatory prosecution by conceding that others similarly situated were not prosecuted while refusing to comment on the fact that Defendant was denied the opportunity to show that his selection for prosecution was based on his exercise of First Amendment rights, despite the fact that it was conceded that Warinner was prosecuted because he was a "vocal tax protestor".

Finally, the Court of Appeals decreed that nonregistered voters -- who presently constitute more than 50% of the adult population of this

nation -- do not constitute a cognizable group, ipse dixit.

The opinion was filed October 11, 1979, and the petition for rehearing was denied November 14, 1979. A motion for Stay of Mandate pending filing and disposition of the Petition for Writ of Certiorari was granted by the Court of Appeals.

PORTIONS OF THE TRIAL

Pursuant to a subpoena Inar Morics, Chief of the Criminal Investigation Division of the IRS for the District of Minnesota, testified before Magistrate J. Earl Cudd on February 19, 1979. At pages 51-52 of the transcript of that hearing he was asked by defense counsel to describe "legal tax protest activities", to which he responded, "Printing and distributing literature, speaking in public regarding the tax laws, things of that nature, writing letters to newspapers.

Q. Would such activities subject the participant to any kind of surveillance or any

kind of investigation by the Internal Revenue Service or some other governmental agency?

A. I don't believe so."

Then, at page 53:

"Q. Is it your statement that there was no intelligence gathering, no investigation of people engaged in legal protest activities prior to January 10, 1979?

A. No, that's not my statement."

And, at page 61:

"Q. Are you aware of any prosecutions that have been undertaken against individuals charged with §7205 violations who are not tax protesters?

A. No, sir."

Then, at page 73:

"Q. Is it your understanding that there is no surveillance or information gathering or investigation directed at legal tax protestors unless there has been what you determine to be illegal tax protext first?

A. In this district, that's true, yes.

Q. Do you have a department within your department or within the Internal Revenue Service at large which collects letters to the editors or collects any statements made by tax protestors and keeps a log of these things?

A. I don't know of any such department."

Then, at page 74:

Q. Do any other agencies of the government ===state, local, federal===gather information for you upon which you rely, and by 'you' I mean the Intelligence Division of the Internal Revenue Service in this district?

A. No, they don't gather information for us. However, we go to them for information on occasion.

Q. ...for which departments or divisions within the Internal Revenue Service?

A. I can speak for my division, and we do use them as sources of information.

Q. Whom do you use?

A. State and local law enforcement agencies.

Q. Do you use the FBI?

A. Yes.

Q. Do you use the FBI and these other agencies as it relates to tax protestor cases?

A. We may have."

Then, at page 82:

"Q. I just wanted to find out which agencies of local, state or federal government were involved in the surveillance and other intelligence activities that I asked you about earlier ... Do you send agents, or do any of these agencies send agents to any meetings of tax protestors?

A. I believe so.

Q. What are the criteria for making that determination?

A. Well, I don't know what the criteria are in other agencies, but in ours we may send an agent to attend a meeting if there are individuals who have indicated by material they have filed with us that they are illegal tax

protestors -- involved."

And, finally, at page 83:

"Q. Are you furnished with the names of those who attend meetings?

A. No, sir, normally just the names of the individuals who we have an interest in in terms of illegal tax protest activities.

Q. Since you already know the names of these people before the agents go to the meetings, what are the agents doing at the meetings?

Mr. Morrow: Objection, irrelevant.

The Court: Sustained.

Q. May I inquire what intelligence gathering duties they have at these meetings?

A. Our interest would be in identifying any other illegal tax protestors."

Defense counsel was permitted to question three agents of the IRS and the closest thing to an explanation for how Mr. Warinner came to the attention of the IRS is the following:

Mr. Douglas Hantke, Chief of the Audit

Division testified as follows:

"Q. Can you tell us how Mr. Holland (the agent who officially commenced the investigation) came to investigate North Central Airlines employees?

A. I don't know how the original audit commenced."

Petitioner submits that the tortuous testimony of the Chief of the Criminal Investigation Division - culminating in the admission that his agency sends agents to infiltrate legal tax protest meetings to identify participants engaged in activities protected by the First Amendment -- establishes that citizens are targeted for criminal investigation and prosecution in a manner violative of First Amendment rights. Documents attached to the Defendant's motion to dismiss based on unconstitutional discrimination establish that this practice is not limited to Minnesota. An opinion of the Ninth Circuit United States Court of Appeals is included in

the attachments to the motion, which opinion reverses convictions under 26 U.S.C. §7205 because prosecutions were brought by the same method as described by Mr. Morics in this case.

An evidentiary hearing would establish that Warinner was selected for prosecution by a process of infiltrating public meetings and investigating the participants, which led to Warinner's indictment.

ARGUMENT FOR GRANTING THE WRIT AND QUESTIONS ON REVIEW

The Court of Appeals formulates the first prong of Defendant's attack on his conviction thusly:

"On appeal Warinner contends first that the subject Form W-4E involved an unlawful search in violation of his fourth amendment rights, compelled self-incrimination in violation of his fifth amendment rights, and was obtained in violation of his sixth amendment rights.

"...Recognizing that the fourth amendment only extends to searches conducted by the government, Burdeau v. McDowell, 256 U.S. 465 (1921); United States v. Haes, 551 F.2d 767 (CA 8, 1977), Warinner argues that Kitty Essman was an agent of the IRS." (at p. 4)

Having properly presented the issue, the Court of Appeals cites a principle and a case inapposite to this one and launches into an argument that is pure ignorantio glenchi:

"Appellant's position, however, is untenable. In United States v. Echols, 477 F.2d 37 (CA 8, 1973), this court recognized the general rule that a search will be considered invulnerable to fourth amendment attack so long as the search is conducted for private purposes and without instigation or participation of government agents.

"First, Ms. Essman, the North Central payroll manager, requested that Warinner submit a new withholding form at least in part for the company's own purposes. Because IRS regulations

indicated that an altered employee withholding exemption certificate may result in extra tax liability, Ms. Essman asked Warinner to file a new form for the purpose of helping the employee to comply with federal income tax regulations and avoid excessive tax payments. Thus, the Essman note had clearly private purposes.

"Kitty Essman's dealings with Warinner were also conducted without direct instigation by or participation of government agents. Although the IRS informed Ms. Essman of the potential invalidity of Larry Warinner's tax withholding form the IRS did not ask her to request that Warinner file a new form W-4E. The IRS merely noted that the Internal Revenue Code does not require an employer to ascertain the correctness of the Form W-4E and indicated an employer's legal responsibility was to inform the IRS of a potentially invalid certificate.

"The fact that in part the IRS regulations consequentially may have motivated Ms. Essman

to request a new withholding form is not in itself sufficient to create a government act within the ambit of the fourth amendment." (at pp.5-6) (emphasis added)

Nothing in this case even remotely suggests that Ms. Essman's note had any private purpose. On this point, Ms. Essman's testimony at trial is as follows:

"Q. Can you identify Government's Exhibit No. 10?

A. It's a W-4E filed by Larry Warinner on April 1 of 1976 pertaining to the year 1976." (Vol. 1, p. 97)

Continuing at page 101 of Volume 1 of the transcript:

"Q. Kitty, when you received this form what did you do with it?

A. I accepted this as was and honored the exemption form withholding per Mr. Warinner's request.

Q. When did it come to your attention that

a W-4E form with attachments or alterations was an invalid form?

A. During several investigations by the Internal Revenue. Special Agents were at our office and indicated that these forms were invalid according to revenue code, which I don't know the number of, and therefore that I should disregard them. We did not obey at that time. We wanted some written authorization before we disregarded any W-4 or W-4E forms from our employees.

Q. Did you get that written authorization?

A. Yes. In August of 1976 we received a letter from the Internal Revenue Service with specific names of employees whose W-4E exemption forms was invalid.

Q. Showing you what's been marked for identification as Government's Exhibit No. 11, can you identify that?

A. This is a letter sent to me dated August 24 of 1976 from the Internal Revenue

Service pertaining to the W-4E form on file for Larry Warinner." (Trans. Vol. I, p. 102)

To complete the refutation of the Court of Appeals contentions that 1) "the Essman note had clearly private purposes", 2) "Kitty Essman's dealings with Warinner were also conducted without direct instigation by or participation of government", and 3) "in part the IRS regulations consequentially may have motivated Ms. Essman to request a new withholding form is not in itself sufficient to create a government act within the ambit of the fourth amendment. [Meister v. Commissioner, 504 F.2d 505, 510 (CA 3, 1974)]" this language from §31.3402(f)(2)-1(e) is sufficient:

"If an employer receives an invalid withholding exemption certificate he shall consider it a nullity for purposes of computing withholding; he shall inform the employee who submitted the certificate that it is invalid, and shall request another withholding exemption certificate from the employee." (emphasis added)

Ms. Essman's note was compelled, including the request for another certificate, by the unequivocal language of the regulation and there is not one scintilla of evidence suggesting that her actions had any private purpose or were in any sense voluntary. The Meister case, supra, involved Meister's claim of a fourth amendment violation on the basis that the books and records of a corporation wholly owned by Meister were turned over to the IRS by that corporation's officer manager, who was the custodian of those records. The comparison ignores the fact that Warinner was already the focus of a criminal investigation when the W-4E at issue was elicited from him pursuant to the command of the quoted regulation, whereas the investigation of Meister did not commence until the office manager blew the whistle on Meister and the records were turned over to the IRS.

The Court of Appeals citations of Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574,

65 L.Ed. 1048, and United States v. Echols, 477 F.2d 37 (1973), should be considered in the light of that Court's holding in Echols, supra:

> "Our recent case of United States v. Burton [475 F.2d 469 (CA 8, 1973)] in which this court confirmed the private character of an airline search, is dispositive of the present case. In that case, defendant purchased an airline ticket and, at the same time, checked two bags for flight. The ticket agent, suspicious because defendant fit the security profile, and the weight distribution of one of his bags seemed unusual, searched the bag and found a gun. A federal marshal was notified and defendant arrested.
>
> In Burton, we recognized the general rule that searches of packages or luggage by airline employees are invulnerable to fourth amendment attack so long as the search is conducted by the carrier for its own purposes and without the instigation or participation of government agents. [citations omitted]. In the present case the search of appellant's travel bag was conducted solely by a TWA employee for the purpose of obtaining identification of the owner of the luggage. The employee was acting pursuant to a TWA regulation authorizing the precise conduct in which he was engaged.

There is not a scintilla of evidence that any government agent requested that the search be made, was present when the travel bag was opened, or had any knowledge concerning the activity until after the gun had been discovered."

In United States v. Haes, 551 F.2d 767 (1977), the Court of Appeals for the Eighth Circuit reversed appellant's conviction because the corpus delicti - obscene material - was obtained through a search and seizure initiated by a common carrier, but consummated by the FBI.

> "The search and seizure of property by a private individual without any governmental involvement is not subject to the dictates of the exclusionary rule. Burdeau v. McDowell, 456 U.S. 465, 467, 41 S.Ct. 574, 66 L.Ed. 1048 (1921). The courts have engaged in a two prong analysis of 'allegedly' private searched, however, separately analyzing the search aspect apart from the actual seizure in order to determine whether there was sufficient governmental participation in either aspect to require fourth amendment protection. See United States v. Sherwin, 539 F.2d 1, 6-7 (9th Cir. 1976), United States v. Kelly, supra, 529 F.2d at 1371. Thus, as in Sherwin and Kelly, when the search was held to be a private search, the inquiry then focused on

> the nature of the seizure and whether it had passed constitutional muster. In this case, though the police obtained a warrant prior to seizing the films, our inquiry into the nature of the search is not obviated.
>
> The distinction between a private search and a governmental search has been considered in several cases. It has been held that where a search is physically conducted by a private individual but only at the government's initiation and under their guidance it is not a private search. United States v. Newton, 510 F.2d 1149, 1153 (7th Cir. 1975); Corngold v. United States, 367 F.2d 1, 5 (9th Cir. 1966).
>
> . . .
>
> Finding that the Denver search was illegal, the evidence obtained in that search must be suppressed. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Since the subsequent search of Haes' office in Des Moines is a direct result of the information obtained in the Denver search, the evidence gathered in the Des Moines search must also be suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962)."

It is not difficult to distinguish Echols from Haes, nor can one seriously contend that Kitty Essman's solicitation of the incriminating W-4E here at issue was not initiated by the government. In its opinion at page 6, the Court of Appeals seems to concede as much in the following language:

> "But even assuming Kitty Essman was acting on behalf of the IRS, her letter together with Warinner's response did not amount to a seizure. Appellant cites Boyd v. United States, 116 U.S. 616, (1886), to support his theory that the Essman note violated the fourth amendment. In Boyd, the Supreme Court declared unconstitutional a subpoena for an invoice which showed that importers were fraudulently claiming excess duty exemptions. Boyd,however, involved compulsory production of evidence under a subpoena. Here, Warinner's filing of the W-4E was not compulsory, but rather entirely voluntary. Appellant was not obliged to file a Form W-4E to carry out his tax protest. He could have filed a Form W-4 and paid his income tax and then filed for a refund at the end of the year. True, he would have been denied the use of his money for a time, but that economic compulsion does not

> change the essentially voluntary nature of his act."

The foregoing proposition, i.e. "economic compulsion does not change the essentially voluntary nature of his act", constitutes an unfortunate failure to apprehend the Boyd case, which stands for precisely the opposite proposition, i.e.:

> "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be ..." Boyd, supra.

The assertion by the appellate court that Warinner "could have filed a W-4 ... and then filed for a refund ... (though) he would have been denied the use of his money for a time ..." appears to be that court's attempt at a jest, since the remainder of the opinion reveals that the court is well aware of the probable outcome of such a refund suit. But in thus mocking the appellant's protest, the Eighth

Circuit reveals the unstated assumption which leads to all its conclusions, i.e. Warinner had no choice but to fill out a W-4 according to the IRS regulations in order to protest its legality, notwithstanding the fact that he could not do so in good conscience.

In the recent case of Abood v. Detroit Board of Education, 431 U.S. 209, 52 L.Ed.2d 261, 97 S.Ct. 1782 (1977) the Supreme Court addressed the question of proper limits on individual freedom of thought and expression thusly:

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. This view has long been held. James Madison, the First Amendment's author, wrote: 'Who does not see ... [t]hat the same authority whch can force a citizen to contribute threepence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' The Writings of James Madison 186 (Hunt. ed. 1901). Thomas Jefferson agreed that 'to compel a man to furnish contributions of money for the pro-

pagation of opinions which he disbelieves, is sinful and tyrannical.' I. Brant, James Madison: The Nationalist 354 (1948). For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. Elrod v. Burns, 427 U.S. 347, 49 L.Ed. 2d 547, 97 S.Ct. 2763; Stanley v. Georgia, 394 U.S. 557,22 L.Ed.2d 542, 89 S. Ct. 1243; Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, and the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:

> 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178."

The instant case presents us with a heretic who denies the constitutionality of the voluntary self-assessment system and the Internal Revenue Service that enforces the orthodox volunteerism. His dissent is not a defense to civil liability, but the First Amendment must protect him

from an administrative criminalization of his heretical refusal to pay a debt he denies.

The Court of Appeals glosses over the infringement of Warinner's fifth and sixth amendment rights with this general statement:

> "Numerous cases in this circuit have held that it is not a violation of the fifth amendment to require the filing of tax forms. (citations omitted)
>
> ... A fortiori where Warinner was not required to file, but rather voluntarily filed the form W-4E, the appellant is not shielded by the fifth amendment. Andresen v. Maryland, 427 U.S. 463 (1976).
>
> Appellant's sixth amendment argument is equally untenable. Appellant contends that Kitty Essman's failure to give him a Miranda warning denied him the right to counsel.
>
> But, as we noted previously, Kitty Essman's actions were clearly private, and the Miranda requirement does not, of course, apply to private parties. Moreover, the Supreme Court has refused to extend the Miranda requirement to precustodial interrogations, Beckwith v. United States, 425 U.S. 341 (1976), and this court has specifically rejected application of

> Miranda to precustodial interrogations, involving investigations of possible violations of the Internal Revenue Code. United States v. Hiken, 458 F.2d 24 (CA 8, 1972); U.S. v. MacLeod, 436 F.2d 947 (CA 8, 1971); U.S. v. Brevik, 422 F.2d 449 (CA 8, 1970). Because the Essman note was private action as well as precustodial, the Miranda rationale simply does not apply.

Noting that any conclusions based upon the premise that "the Essman note was private action" must be regarded with suspicion, consideration of the cases cited by the Court of Appeals is in order. For the proposition that Warinner's filing of the W-4E was voluntary, the Court of Appeals cites Andresen, supra. In discussing Andresen's fifth amendment argument, the Court reasoned:

> "In this case, petitioner, at the time he recorded his communication, at the time of the search, and at the time the records were admitted at trial, was not subjected to the cruel trilemma of self-accusation, perjury or contempt' ... [Murphy v. Waterfront Comm'n, 378 U.S. 52, 12 L.Ed.2d 678, 84 S.Ct. 1594 (1964)]. Indeed, he was never required to say or to do

anything under penalty of sanction. ... In this case, the statements seized were voluntarily committed to paper before the police arrived to search for them ...". 49 L.Ed.2d 627, at 640.

But in Larry Warinner's case, Warinner's belief in his tax exempt status could only be honestly expressed in one way: by stating that belief without equivocation and attaching to the W-4E he "voluntarily" filed in April of 1976, the legal and philosophical basis for his belief. The Court of Appeals overlooked the fact that the statute upon which Warinner's conviction is based requires the filing of a W-4 or W-4E, nor did its opinion discuss the fact that Warinner's "incriminating" W-4E was not "voluntarily committed to paper before the police arrived to search for [it]...", but, rather, the act for which Warinner stands convicted was committed while he was subjected to the cruel trilemma of 1) filing neither W-4 nor W-4E, thus - by failing to file - violating 26 U.S.C §7205,

2) filing a W-4 which he believed to be false because he denies income tax liability, then - as the Court of Appelas suggests - filing a suit for refund of the taxes he had conceded he owed on the W-4 (under penalty of perjury), alleging that he is entitled to a refund of the taxes he admitted owing under oath, or 3) acting and speaking consistent with his belief, which is what he did. Furthermore, the Court of Appeals omits any mention of the fact that Warinner's filing the W-4E was "required ... under penalty of sanctions", which sanction has been imposed, i.e. withholding on the basis of a single person with one exemption has been done for two years, though Warinner is married and supporting two children.

The Court of Appeals references to Hiken, MacLeod and Brevik, supra, are inappropriate because none involved the threat of forfeiture, none of the statements sought to be suppressed were required by statute, none of those defendants was the focus of criminal investigation

when their disclosures were made, and all were statements regarding past misconduct - none constituted the crime itself as did Warinner's filing the clean copy W-4E in response to a proper request for same initiated by the government.

Certain of the Defendant's constitutional rights were violated when, after he had become the focus of a criminal investigation, 1) Kitty Essman instructed the Defendant that "due to a letter received from the Internal Revenue Service ... please forward the completed new forms W-4E or the W-4 form without any alteration or remarks as soon as possible"; 2) coupled the solicitation with the statement that "failure to submit the new form will result in Federal tax deduction based on single with no exemption starting September 21, 1976"; and 3) the Indictment herein was procured based on the Defendant's filing a W-4E "without any alteration or remarks" in response to the Essman letter.

We begin the analysis with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), which focused on securing the Fifth Amendment privilege against compelled self-incrimination, and Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), which dealt with the essence and application of the Sixth Amendment right to the effective assistance of counsel, 384 U.S. at 469-77, 86 S.Ct. at 1625-29; the "prime purpose" of the Court's Miranda holding was "to guarantee full effectuation of the privilege against self-incrimination", Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1779, 16 L.Ed.2d 882 (1966), and "not to vindicate the constitutional right to counsel as such". Kirby v. Illinois, 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 (1972).

Since we contend that the W-4E here in question was obtained by violating Defendant's Fourth Amendment right to be free from an unreasonable search or seizure as well as his

Fifth Amendment rights to due process of law and freedom from compelled self-incrimination and Sixth Amendment right to counsel, it is pertinent that "nothing decided or said in Miranda or Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), links the right to counsel only to the protection of Fifth Amendment rights". United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967). To the contrary the right to counsel is a guarantee, "as broad as the mischief against which it is designed to guard", that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial". Id.

In the instant case, the IRS investigation had long since become a criminal investigation when the September, 1976, W-4E was elicited by Kitty Essman's note. In the very recent case of Brewer v. Williams, 430 U.S. 387, 97 S.Ct.

1232, 51 L.Ed.2d 424 (1977), the Supreme Court held:

> "That the incriminating statements were elicited surreptitiously in the Massiah cash, and otherwise here, is constitutionally irrelevant. McLeod v. Ohio, 381 U.S. 356, 14 L.Ed. 2d 682, 85 S.Ct. 1556; U.S. v. Crisp, 435 F.2d 354, 358 (CA 7); U.S. ex rel O'Connor v. New Jersey, 405 F.2d 632, 636 (CA 3); Hancock v. White, 378 F.2d 479 (CA 1). Rather, the clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 400, 97 S.Ct. at 1240, 51 L.Ed.2d at 437-38.

"The moment at which adversary proceedings have commenced against an individual", as regards criminal tax investigations, is a question recently answered in the case of Beckwith v. U.S., 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1. Beckwith was charged with attempted federal income tax evasion and prior to trial in U.S. District Court for the District of Columbia he moved to suppress statements he had made to special agents of the Internal Revenue Service

at a noncustodial interview that had been conducted in a private home. Just as the Defendant Warinner argues in this case, "(Beckwith) contends that the 'entire starting point' for the criminal prosecution brought against him was secured from his own statements and disclosures during the interview with the Internal Revenue agents from the Intelligence Division. He correctly points out that cases are assigned to the Intelligence Division only when there is some indication of criminal fraud and that, especially since tax offenses rarely result in pretrial custody, the taxpayer is clearly the 'focus' of a criminal investigation when a matter is assigned to the Intelligence Division." (emphasis added). Beckwith, 48 L.Ed.2d 1, at p. 6. The agent from the Intelligence Division testified that Warinner's case had been assigned to the Intelligence Division prior to the instructions to Ms. Essman and the ensuing letter. (Record, Vol. II, pp. 155-157).

The comparison between Defendant herein and Defendant Beckwith is particularly compelling: like Beckwith," 'the entire starting point' for the criminal prosecution brought against him was secured from his own statements ...". But here, Defendant Warinner was given no warning of the danger to Fifth and Sixth Amendment rights; to the contrary, the instant case evinces Massiah-type subterfuge on the part of the IRS, which instructed Ms. Essman to solicit the W-4E filed by Warinner which comprises the putative corpus delicti herein. In Massiah, supra, the government elicited incriminating statements from the Defendant, after he had become the focus of adversary proceedings, by planting a radio transmitter in the automobile of Massiah's co-defendant, who had decided to cooperate with the government and testify against Massiah. In this case, the government has used Defendant's employer to induce Defendant to file the W-4E which is the subject of

the Indictment.

It does not require a close reading of the Essman letter to ascertain that it falls so far short of the caveat deemed adequate in Beckwith that no discussion of waiver need be undertaken herein. The specific variety of constitutional violation which is the subject of this motion to suppress, i.e., use by IRS agents of the third party - Essman - to elicit the incriminating W-4E from Defendant by implying IRS sanction of the procedure on the one hand, while threatening confiscation of Defendant's property on the other, is subsumed in the statement of the Supreme Court in Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L. Ed.2d 1037 (1961):

> "Certainly the police may not circumvent a constitutional requirement by using the 'technique' of posing a question in declaratory fashion." U.S. v. Jordan, 557 F.2d 1081, at 1085 (CA 5, 1977).

Nor can IRS agents circumvent constitutional requirements by taking advantage of the

actions of third parties to secure incriminating evidence by "entreaty" and "deception". Knoll Associates, Inc. v. FTC, 397 F.2d 530 (1968) concerned a proceeding in which documents stolen by an employee named Herbert Prosser from his corporate employer were introduced against the employer in an action to enforce Clayton Act provisions before the Federal Trade Commission.

> "The action of the Commission in utilizing the fruits of the misconduct of Prosser violated rights of petitioner (Knoll Associates, Inc.) protected by the Fourth Amendment to the federal constitution. The undisputed evidence shows that Prosser stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission by its use of the documents knowingly gave its approval to Prosser's unlawful act ... That the evidence was taken and actually used for the purpose of aiding the Commission to enforce the Clayton Act does not justify the action. Gambino v. U.S., 275 U.S. 310, 317, 48 S.Ct. 137, 72 L.Ed.293 (1927)...."

Kitty Essman's letter - according to its contents sent under IRS auspices - produced a document from Defendant Warinner which could

not have been compelled by any legal process even if it had been in existence prior to the Essman solicitation. Accordingly, her letter, with its threat to withhold excessively the earnings of Defendant Warinner, pursuant to §31.3402(f)(2)-1(e), constituted:

> "...the equivalent of a search and seizure - and an unreasonable search and seizure - within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence and effects their substantial purposes ... illegitimate and unconstitutional practices ... can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." Boyd v. U.S., 116 U.S. 616, 635, 6 S.Ct. 524, 534, 29 L.Ed. 746 (1886).

A federal officer charged with enforcement of laws pertaining to counterfeiting received telephone calls from the local police and the manager of a hotel indicating violation of these laws being carried on in a room of the hotel. After securing warrants for the arrest

of the tenants on charges of violating local criminal law, the local police made a search of the room and, upon finding evidence indicating counterfeiting, sent for the federal officer, who came to the hotel and examined the evidence. When the tenants returned, they were arrested and searched by the local police and evidence relevant to counterfeiting was given to the federal officer. On these facts the Supreme Court held in Lustig v. U.S., 338 U.S. 74, 93 L.Ed. 1819 (1949), the trial court should have granted Lustig's motion to suppress evidence gathered in the search at his trial on counterfeiting charges, because of federal participation in an illegal search.

> "We therefore accept as a fact that (the federal officer) did not request the search ... and that the search was not undertaken by the police to help enforcement of federal law. But search is a functional, not merely a physical process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense ... To differentiate between participation from the beginning of an

illegal search and joining it before it had run its course, would be to draw too fine a line in the application of the Fourth Amendment prohibition as interpreted in Byars v. U.S., 273 U.S. 28, 71 L.Ed. 520, 47 S.Ct. 248 ... the decisive factor in determining the applicability of the Byars case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means ... Evidence secured through such federal participation is inadmissible for the same considerations as those which made Weeks v. U.S., 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341, the governing principle in federal prosecutions."

The rule enunciated in Knoll, Lustig, Byars and Weeks nullifies any contention that the Essman letter cannot be attributed to the government. The specifics of the intercourse between the IRS agents and Ms. Essman were adduced at trial (Record, Vol. I, pp. 101-109; Gov'ts Exs. 11, 12 and 13).

> "The government cannot disown (the third party) and insist it is not responsible for his actions ... The government cannot make use of (a third party) and then claim disassociation through ignorance ... As between the government agent and (the cooperating third party) each is deemed to have knowledge of the

actions of the other." Sherman v. U.S., 356 U.S. 369, 373, 375 (1958); U.S. v. Bueno, 447 F.2d 903 (CA 5, 1971); U.S. v. Soto, 504 F.2d 557, 559, (CA 5, 1974).

Defendant submits: that criminalization of Warinner's response to the Essman letter constitutes an "insidious encroachment" on Defendant's Fourth, Fifth and Sixth Amendment rights. Justice Marshall's remarks, concurring in Brewer v. Williams, 430 U.S. 387, 51 L.Ed. 2d 424, 442, 97 S.Ct. 1232 (1977) are especially appropriate to the investigative techniques used vis-a'-vis this Defendant:

> "It is equally important that the police, as guardians of the law, fulfill their responsibilities to obey its commands scrupulously. For 'in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.' Spano v. New York, 360 U.S. 315, 320-21, 3 L.Ed. 2d 1265, 79 S.Ct. 1202 (1959)."

The Brewer case involved the brutal murder of a ten-year old girl, whereas in this case Defendant is charged with conduct tantamount to nothing more than a protest of government fiscal

and taxing policy, protected by First Amendment rights. IRS regulations dictated that Defendant's protest be ignored. See 18 U.S.C. §1001 for the requirement that a misstatement be material.

The standards enunciated below codify the judicially-developed entrapment formulation better than any compendium of case citations and faithfully reflect the most recent U.S. Supreme Court definition of entrapment in the case of U.S. v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). Section 2.13 (1) (b) of the Model Penal Code and Sections 702 (2) and (3) of the proposed New Federal Code define the conduct of the IRS agents and Ms. Essman which compels suppression of the W-4E elicited in response thereto:

> "Both the Proposed New Federal Criminal Code (1971), Final Report of the National Commission on Reform of Federal Criminal Laws, §702, and the American Law Institute's Model Penal Code, §2.13(1962), adopt this approach to entrapment:
>
> (Section 2.13 of the Model Penal Code provides:

> ("(1) A public law enforcement official or a person acting in cooperation with such an official (emphasis added) perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> ("(a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or
>
> ("(b) employing methods of persuasion or inducement which creates a substantial risk that such an offense will be committed by persons other than those who are ready to commit it (emphasis added).
>
> ("(2) Except as provided in Subsection (3) of this Section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of evidence that his conduct occurred in response to an entrapment. The issue of entrapment shall be tried by the Court in the absence of the jury.
>
> ("(3) The defense afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment."
>
> (Section 702 of the Proposed New Federal Code, which represents the first federal

codification of the judicially-developed defense of entrapment, provides:

("(1) Affirmative Defense. It is an affirmative defense that the defendant was entrapped into committing the offense.

("(2) Entrapment Defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense.

Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

("(3) Law Enforcement Agent Defined. In this section 'law enforcement agent' includes personnel of state and local law enforcement agencies as well as of the United States, and any person cooperating with such an agency.") (Emphasis added.)

Two questions were answered in Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921) at 651, which bear directly on the instant motion: (1) Is the secret taking, without force, from the house or office of one suspected of crime, of a paper belonging to him, of evidential value only, by a representative of any branch or subdivision of the government

of the United States a violation of the Fourth Amendment? (2) Is the admission of such paper in evidence against the same person, when indicted for crime, a violation of the Fifth Amendment? This case involved secret taking of an incriminating document by a friend of the defendant, whose work as a government agent was unknown to the defendant, who had given the "friend" permission to be on the premises. The U.S. Supreme Court answered both questions in the affirmative and reversed defendant's conviction. Warinner submitted an incriminating document to his friend Ms. Essman, who was the unwitting agent of the government when she submitted it.

Careful scrutiny of all relevant precedents, including those cited herein, reveals no recent decision paralleling the case at bar to the degree of similarity found in Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), an older, but nonetheless vital and viable holding,

the law and facts of which are identical in all pertinent particulars to the instant case. Boyd arose from an information filed by the United States Attorney in a case of seizure and forfeiture of property, seized by the collector as forfeited to the United States, under the "Act to Amend the Customs Revenue Laws", which provided that any person who, with intent to defraud the revenue, imports or attempts so to do by means of any false statement, written or verbal, or any fraudulent or false invoice, affidavit or letter, or who is guilty of any willful act or omission "by means whereof the United States shall be deprived of the lawful duties ... shall be fined and/or imprisoned; and ... such merchandise shall be forfeited." The act further empowered the Court to issue a subpoena to compel production of documents; a defendant's failure to produce such documents resulted in forfeiture of the property.

In the instant case, Warinner's W-4E was

compelled by the threat of forfeiture described above.

> "Reverting then to the peculiar phraseology of this Act and to the information in the present case, which is founded on it, we have to deal with an Act which expressly excludes criminal proceedings from its operation, although embracing civil suits for penalties and forfeitures, and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both." Boyd at p. 752.

Defendant submits that the compulsive force exerted by Kitty Essman's letter is constitutionally indistinguishable from that described in Boyd and that suppression of the fruits of such compulsion is mandated by the Boyd decision. The ratio decidendi of Boyd would nullify any requirement that the movant herein demonstrate that he was the "focus of adversary proceedings", Beckwith, supra, in order to be entitled to Beckwith or Miranda-type warnings. Movant submits

that, though such a showing was made, one is not required in order to establish that the W-4E in this case should have been suppressed. In Beckwith, the defendant was given a Miranda warning by the interviewing IRS agents, which warning lacked only a statement 'that if the Defendant were unable to afford counsel that counsel would be appointed to represent him' to make it a complete Miranda advisement. Defendant Beckwith was not threatened with the forfeiture of his property to persuade him to make disclosures as was Defendant Warinner. Defendant Beckwith was warned that any statements he made might be used to incriminate him, in contrast to Warinner, who was advised that he had to submit a W-4E without any alterations or unauthorized additions or suffer confiscation, all of which was done under the auspices of the IRS by Essman's reference thereto.

The instant case presents us with a heretic who denies the Constitutionality of the voluntary

self-assessment system and the Internal Revenue Service that enforces the volunteerism. His dissent is not a defense to civil liability, but the First Amendment must protect him from an administrative criminalization of his refusal to pay a debt he denies.

We do not have here the situation found in U.S. v. Sacco, 428 F.2d 264 (CA 9, 1970) where the intensive investigation of the appellant was based upon his participation in organized crime; nor is this a case like U.S. v. Swanson, 509 F.2d 1205 (CA 8, 1975) involving tax professionals nor is it a case like Ojala, 544 F.2d 940 (CA 8, 1976) where the protester was selected on the basis of his political office and the consequent notoriety; nor again is it a case like Catlett, 584 F.2d 864 (CA 8, 1978), who alleged he was prosecuted because of the publicity he received. These were justifiable standards, whereas selecting as defendants persons exercising their First Amendment right to protest against the laws of

the United States relating to the Internal Revenue Service clearly violates their constitutional rights. (See U.S. v. Steele, 461 F.2d 1148 (CA 9, 1972). This is the basis for Warinner's claim.

The critical distinction between Larry Warinner and the Defendants in Ojala, Catlett, and Swanson, supra, the recently decided cases in the Eighth Circuit delineating the difference between permissible and impermissible selective prosecution, is this:

> In each of those cases the Court found that, in addition to the exercise of constitutional rights by Defendants as the basis for criminal prosecution, ("... a purpose [which], if established, would fatally infect the prosecution by denying appellant the equal protection of the laws which is embodied in the due process clause of the Fifth Amendment ..." Ojala, supra, at p. 943) those Defendants' cases each presented an aggravating factor of publicity-seeking and position which purged the prosecution of the otherwise "fatal infect(ion)" of retribution for Defendants' exercise of protected rights.

Larry Warinner is not a notorious tax protester, nor a tax professional, nor an elected

official. The prima facie showing of unconstitutional discrimination made in Ojala and Catlett, supra, can be judicially noticed by this Court. The testimony of the witnesses from the IRS at the hearing held in this case February 19, 1979, and the affidavits and exhibits from the Foster case which persuaded the Ninth Circuit Court of Appeals to vacate the convictions under 26 U.S.C. §7205 combine to compel the conclusion that Larry Warinner was prosecuted because he exercised his First Amendment rights to protest the income tax assessed on his wages. It is undisputed that Warinner voluntarily disclosed his refusal to voluntarily comply with IRS regulations, nor is there any evidence that he sought or received any publicity, which might resuscitate his prosecution from its fatally defective condition, i.e. based solely on his exercise of constitutional rights when the government knew of others similarly situated but declined criminal prosecution of them.

Nothing less than an evidentiary hearing preceded by disclosure of relevant IRS documents will reveal the truth about this case.

The statistics presented by the United States in the case of U.S. v. Oaks, 508 F.2d 1403 (9th C. 1974) leave much to be desired but they tend to indicate that there is clear discrimination against "tax protesters" in applying the standards of prosecution for both "willful failure to file" violations and violations for filing false Form W-4E under Sections 7203 and 7205, respectively, of the Internal Revenue Code.

In this instance the government presented statistics disclosing that it prosecuted only tax protesters on §7205 violations for the tax years 1970 through 1973. The government statistics revealed that only 24 cases of filing false withholding statements were investigated by the Intelligence Division of the Internal Revenue Service. All of these involved tax protesters. Other violations of §7205 came to the attention

of the Intelligence Division. The transcript in the evidentiary hearing on the selective prosecution motion in the Oaks case reads as follows at pp. 174-175 thereof:

"Q. Isn't it a fact that other people besides tax protesters file improper W-4 forms?
A. I am sure there must be some somewhere.
Q. It is a fact that a number of them came to your attention in 1973, isn't it?
A. Allegations came to our attention -- came to the Service's attention, yes.
Q. And didn't you make on-the-scene investigations and examine the W-4 forms?
A. By "you", no, we did not make an investigation in the Intelligence Division of potential crime violations. Examinations and inquiries were made by the Audit and Collection functions.
Q. Working jointly with Intelligence?
A. The inquiries were made independently of the Intelligence Division. It was not in any way a criminal investigation.
Q. But there was no question that it came to the attention of the Internal Revenue Service?
A. There is no question."

The Defendant would ask the United States to furnish statistics as to how many cases of false W-4's and/or W-4E's came to the government's

attention that they did not prosecute. That information was not furnished in the Oaks case and it is believed it will present a pretty sorry picture. It will show there were hundreds of such violations which came to the attention of the Internal Revenue Service but which they did not prosecute, in the opinion of the attorney for the Defendant. This Defendant and Garth Good are the only two employees of North Central Airlines who have been prosecuted, though Payroll Clerk Kitty Essman testified at Good's trial that approximately 75 to 90 irregular or suspicious W-4's and W-4E's were then on file at North Central.

It is not sufficient for the government to show which cases have been referred to the Intelligence Division of the Internal Revenue for criminal prosecution. It is more important to show which cases were determined not to be worthy of criminal prosecution so that they were not referred to the Intelligence Division for

criminal prosecution. It is these statistics that the government failed to produce in the Oaks case. These statistics are believed to be available and can be secured by the local audit division of the Internal Revenue Service from the complete records which they maintain on information coming to them and the disposition thereof.

Guidelines for referral of cases to the Intelligence Division in the ordinary cases are to be found in the published manuals of the Internal Revenue Service. These should be and can be supplied by the Internal Revenue Service relating to §7205 violations which were not referred to the Intelligence Division for prosecution. The standards in the manual for the ordinary taxpayer and the vocal tax protester are completely different. The latter have not been published by the Internal Revenue Service. It is hereby requested that defense counsel be permitted to view all memoranda relating to tax

protesters with the caveat that they may not be disclosed to anyone else including the Defendant without permission of the court. It is generally the rule that when the allegations of discriminatory prosecution pass the threshold of frivolity an evidentiary hearing should be granted, as in the Eighth Circuit cases of Mirabile, supra, and Swanson, supra. It is a sine qua non of such a hearing that the court issue an order directing the IRS to produce statistics relating to: how many false or incorrect W-4 or W-4E forms are brought to the attention of: 1) the Audit Division and 2) the Collection and, of these, how many are referred to the Intelligence Division for criminal investigation and prosecution and 3) the Intelligence Division and how many are investigated and recommended for criminal prosecution. The criteria for 1) referral, 2) investigation, and 3) criminal prosecution would also assist the court in determining whether the basis for selection is

constitutionally infirm. The lower court erred in refusing to order disclosure of the data sought by Defendant and this Court should vacate the conviction and remand this case for a proper evidentiary hearing.

The Court of Appeals' discussion of Warinner's challenge based on discriminatory prosecution concedes that he established the fact that he was singled out for prosecution while others similarly situated have not been prosecuted for like conduct, but declares that he "has failed to show his selection was based impermissibly on exercise of his First Amendment rights" (p. 9). The attention of this Court is respectfully invited to the "Portions of the Trial" section of this petition, which, it is submitted, belies that conclusion.

Finally, petitioner submits the Appellate Court erred in rejecting his claim that non-registered voters constitute a cognizable group, based on cases all of which were decided prior

to Taylor and, of course, Duren; this is so particularly in the aftermath of the recent decision of the United States Supreme Court in Duren v. Missouri, 99 S.Ct. 1623, 58 L.Ed.2d 317 (1979), which reiterated the three-part test set forth in Taylor v. Louisiana, 419 U.S. 522 (1975), under which a defendant must show the following to establish a prima facie case of violation of the fair cross-section requirement: 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation results from systematic exclusion of the group in the jury selection process.

Those citizens in our society who do not register to vote, among whom are the appellant and virtually everyone sympathetic to his protest, are: 1) "distinctive" because of their enormous

numbers and their disaffection with the present political process, 2) not represented on any juries in the District of Minnesota, which cannot be fair and reasonable, and 3) systematically excluded by the jury selection process, i.e. none but registered voters are considered.

No showing of "invidious discrimination" in voter registration procedures is required as is conclusively established by Taylor, supra, and Duren, supra.

CONCLUSION

Because 1) the production of the W-4E here at issue violated Defendant's Fourth, Fifth, and Sixth Amendment rights, 2) the Defendant's prosecution was undertaken to deter the exercise of First Amendment rights and 3) the jury which decided his case was not a fair cross-section of the community, the Court should grant certiorari and resolve the legal

conundrums and alleviate the injustice of the Court of Appeals' affirmance of petitioner's conviction.

Respectfully submitted,

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December 11, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by despositing the same in the U.S. Mail, Denver, Colorado, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

this 13th day of December, 1979.

William A. Cohan